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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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9 UNITED STATES OF AMERICA,

No. CR 10-0703 MMC

10 Plaintiff,

**ORDER DENYING DEFENDANT'S  
MOTION FOR RELIEF UNDER 28 U.S.C.  
§ 2255**

11 v.

12 MICHAEL HIGGINBOTHAM,

13 Defendant.  
14 \_\_\_\_\_/

15 Before the Court is Michael Higginbotham's ("Higginbotham") motion, filed  
16 December 7, 2011, for relief under 28 U.S.C. § 2255.<sup>1</sup> Respondent United States of  
17 America has filed opposition, to which Higginbotham has replied. Having read and  
18 considered the papers filed in support of and in opposition to, the motion, the Court rules as  
19 follows.

20 **FACTUAL BACKGROUND**

21 On August 4, 2012, Higginbotham and another individual approached an Internal  
22 Revenue Service Special Agent outside her home, pointed a shotgun at her, and  
23 demanded money. (See Plea Agreement ¶ 2.) The victim shot at her assailants. (See  
24 Compl. ¶ 6.) Higginbotham was admitted to a hospital later that night with a gunshot  
25 wound to his leg. (See id. at ¶ 9.) The victim was brought to the hospital to view  
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27 <sup>1</sup> Higginbotham's filing is titled "In Accordance With the Courts Order Michael  
28 Higginbotham (Higginbotham) Hereby Submits His Argument[s] Supporting He Was  
Deprived Effective Assistance of Counsel." The Court construes said filing as a motion to  
set aside or correct Higginbotham's sentence under 28 U.S.C. § 2255.

1 Higginbotham but was unable to identify him as one of her assailants. (See id. at ¶ 16.) A  
2 gun matching the description of that used in the robbery was found in Higginbotham's  
3 mother's car, and Higginbotham had been in the area in which the robbery occurred.  
4 (See Opp'n Ex. A (Responses to Interrogatories) ¶ 3(a).)<sup>2</sup> Although Higginbotham initially  
5 denied any involvement, he ultimately admitted he had participated in the robbery. (See id.  
6 at ¶ 4(a).).

7 On September 28, 2010, the government filed a two-count indictment charging  
8 Higginbotham with: (1) assault on a federal officer with a deadly weapon, in violation of 18  
9 U.S.C. §§ 111(a)(1), (b); and (2) using and/or carrying a firearm during and in relation to a  
10 crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii).

11 On March 23, 2011, Higginbotham pleaded guilty to Count One of the indictment  
12 pursuant to a negotiated plea agreement entered under Rule 11(c)(1)(C) of the Federal  
13 Rules of Criminal Procedure. (See Plea Agreement ¶ 1:23; see also Judgment in a  
14 Criminal Case.) The plea agreement provided for a sentence of 60 months on Count One  
15 and dismissal of Count Two. (See Plea Agreement ¶ 8:15.) On June 22, 2011, in  
16 accordance with the plea agreement, the Court sentenced Higginbotham to 60 months on  
17 Count One and, on the government's motion, dismissed Count Two. (See Judgment in a  
18 Criminal Case.)

19 Higginbotham now moves to set aside or correct his sentence under 28 U.S.C.  
20 § 2255, alleging he received ineffective assistance of counsel.

### 21 LEGAL STANDARD

22 A motion to set aside or correct a sentence pursuant to § 2255 entitles a prisoner to  
23 relief "[i]f the court finds . . . there has been such a denial or infringement of the  
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25 <sup>2</sup> In an earlier order, the Court found a limited waiver of the attorney-client privilege  
26 and held the government was entitled to inquire of Higginbotham's counsel as to "any oral  
27 communications with Higginbotham and review any written communications with  
28 Higginbotham relating to the subject areas raised in Higginbotham's claims." (See Order  
filed March 21, 2012 at 2:1-4.) As an exhibit to its opposition, the government filed  
Higginbotham's counsel's responses to interrogatories. In his reply, Higginbotham has not  
contended any statement contained therein is untrue.

1 constitutional rights of the prisoner as to render the judgment vulnerable to collateral  
2 attack.” See 28 U.S.C. § 2255. Where, however, “it plainly appears from the motion, any  
3 attached exhibits, and the record of prior proceedings that the moving party is not entitled  
4 to relief, the judge must dismiss the motion,” see Rules Governing Section 2255  
5 Proceedings for the United States District Courts, Rule 4(b), and may do so without holding  
6 a hearing if the movant has made no “specific factual allegations that, if true, state a claim  
7 on which relief could be granted,” see United States v. Withers, 638 F.3d 1055, 1062 (9th  
8 Cir. 2011). “Merely conclusory statements in a § 2255 motion are not enough to require a  
9 hearing.” See United States v. Johnson, 988 F.2d 941, 945 (9th Cir. 1993) (internal  
10 quotation and citation omitted).

## 11 DISCUSSION

12 Higginbotham claims he received ineffective assistance of counsel in the course of  
13 his plea negotiations, and that his counsel’s deficient performance led him to plead guilty  
14 rather than go to trial. In particular, Higginbotham claims counsel (1) failed to advise him  
15 correctly as to his potential sentence; (2) failed to investigate potential defenses; and  
16 (3) insisted he plead guilty despite his expressed desire to go to trial.<sup>3</sup>

17 To prevail on a claim of ineffective assistance of counsel, Higginbotham must meet  
18 two requirements. He must show that (1) “counsel’s representation fell below an objective  
19 standard of reasonableness” and (2) “there is a reasonable probability that, but for  
20 counsel’s unprofessional errors, the result of the proceeding would have been different.”  
21 See Strickland v. Washington, 466 U.S. 668, 688 & 694 (1984). Because, as discussed  
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23 <sup>3</sup> In his reply, Higginbotham for the first time, and unconnected to any of the above  
24 claims, asserts his counsel withheld from the Court the victim’s statement that she did not  
25 “recognize [Higginbotham’s] face and [he] did not match the build of the young men who  
26 attempted to rob her.” (See Reply at 1.) Higginbotham’s assertion is contradicted by the  
27 record. On September 23, 2010, Higginbotham’s counsel filed with the Court in connection  
28 with Higginbotham’s detention hearing a memorandum in which counsel points out that the  
criminal complaint itself noted the victim stated, after viewing Higginbotham, that the “face  
is too round, appeared to be lighter ‘complexioned’ in the hospital and also appeared to be  
heavier in the hospital.” (See Def’s Pretrial Mem. Re: Presumptions and Proffers, filed  
Sept. 23, 2010, at 3:4-7 (concluding therefrom that “[the victim] did not identify  
Higginbotham as one of the robbers”).

1 below, Higginbotham cannot meet the first prong of Strickland, the Court will not address  
2 the second, see id. at 697 (stating a court need not “address both components of the  
3 inquiry if the defendant makes an insufficient showing on one”), and, consequently, the  
4 motion will be denied.

5 **A. Advice as to Potential Sentence**

6 Higginbotham first claims he received ineffective assistance of counsel because his  
7 attorney told him that, if convicted at trial, he faced a heavier sentence than was offered in  
8 the plea agreement; according to Higginbotham, “[t]he court – with the appropriate  
9 mitigation arguments *would not* have sentenced him to 60-months after hearing the  
10 evidence.” (See Mot. at 6 (emphasis in original).) The maximum term of imprisonment for  
11 Count One, however, was 20 years, see 18 U.S.C. § 111(b), and, of particular significance,  
12 for Count Two there was a mandatory minimum of seven years in prison consecutive to any  
13 sentence imposed on Count One. See 18 U.S.C. 924(c)(1)(A)(ii). As Higginbotham faced  
14 a statutory mandatory minimum sentence of seven years (84 months) if convicted on Count  
15 Two alone, his counsel did not give him erroneous advice in telling him 60 months was, in  
16 Higginbotham’s words, “better than he would receive if convicted at trial.” (See Mot. at 6.)  
17 Because counsel’s advice was not erroneous, the assistance he provided was not  
18 ineffective. See Harrington v. Richter, 131 S. Ct. 770, 787 (2011) (holding defendant  
19 challenging conviction based on ineffective assistance of counsel must “show that counsel  
20 made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the  
21 defendant by the Sixth Amendment”) (internal quotation and citation omitted).

22 Accordingly, to the extent Higginbotham’s motion is based on a claim of incorrect  
23 advice as to his potential sentence after a trial, Higginbotham fails to show he is entitled to  
24 relief.

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1           **B. Investigation**

2           Higginbotham next claims his counsel did not investigate potentially exculpatory  
3 evidence despite his having told counsel he did not commit the crimes charged.<sup>4</sup> A criminal  
4 defense attorney has a duty to make a reasonable investigation. See Strickland, 466 U.S.  
5 at 691. In this instance, however, Higginbotham fails to identify in his motion, even in the  
6 most general terms, any act his counsel failed to undertake in investigating his defense.  
7 He does not, for example, assert that his counsel failed to obtain evidence relevant to his  
8 innocence, that his counsel failed to review available exculpatory evidence, or that his  
9 counsel failed to interview witnesses. In his reply, Higginbotham asserts, for the first time,  
10 that his sister “states she will come to court and testify” the gun found in Higginbotham’s  
11 mother’s car did not belong to him. To the extent such assertion is intended as a claim that  
12 Higginbotham’s counsel failed to properly interview his sister, the Court finds no such  
13 showing has been made.

14           In particular, Higginbotham makes no assertion that his counsel did not interview his  
15 sister in the course of his investigation. Moreover, the evidence submitted by the  
16 government shows Higginbotham’s counsel did interview his sister, and she stated  
17 Higginbotham told her to put the gun in Higginbotham’s mother’s car. (See Opp’n Ex. A  
18 ¶ 3(a).) If she thereafter recalled the events differently, Higginbotham does not assert any  
19 such different statement was made by his sister prior to the time judgment was entered, nor  
20 does he identify any other circumstance that would have suggested a need for counsel to  
21 interview his sister anew prior to the entry of Higginbotham’s plea. As set forth above, the  
22 issue is whether counsel was deficient in his investigation prior to entry of Higginbotham’s  
23 guilty plea, and Higginbotham has identified no evidence so showing.

24           Accordingly, to the extent Higginbotham’s motion is based on the asserted failure of  
25 his counsel to investigate his defense, Higginbotham fails to show he is entitled to relief.

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27           <sup>4</sup> Higginbotham’s counsel states “Higginbotham first told [him] he did not do the  
28 crime” and “happened to just be walking by when he was shot,” but that Higginbotham  
later “admitted to [his counsel] that he participated in the robbery and aided and abetted the  
incident.” (See Opp’n Ex. A ¶ 4(a).)

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